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Supreme Court, U.S.
FILED

DOCKET NUMBER 02 1644 FEB 28 2003

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

Cleveland & Cleveland, P. C. and Charles Cleveland Petitioners,	)
vs.	)
BBL Group, Inc., Respondent.	)

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Kenneth Lee Cleveland
Counsel of Record for Petitioner
Cleveland & Cleveland, P. C.
Cleveland & Cleveland, P. C.
2330 Highland Avenue South
Birmingham, Alabama 35205
(205) 322-1811
(205) 322-1848 (fax)
E-mail: ClevelandAtty@hotmail.com

47 pp

I. Questions Presented for Review

A. Did the federal court have removal jurisdiction to decide a state court lawsuit filed by an attorney to recover his fee from a former bankruptcy debtor after the Bankruptcy Court, on application filed by the attorney, determined (1) that the fee was not a priority administrative claim due from the bankruptcy estate and (2) that the fee would be due from the debtor or its principals.

B. Does a final judgment by the Bankruptcy Court determining: (1) that a fee claimed by an attorney was not a priority administrative claim due from the bankruptcy estate and (2) that the attorney could seek his fee from the debtor or its principals, preclude, under *res judicata* or *collateral estoppel*, the attorney from subsequently seeking his fee from the debtor?

II. List of Parties to the Judgment

The plaintiffs in this case are Charles Cleveland, an attorney residing in Birmingham, Alabama and Cleveland & Cleveland, P. C., an Alabama Professional Corporation owned by Charles Cleveland and Kenneth Lee Cleveland of Birmingham, Alabama and it declares that it is not publically held.

The defendant is BBL Group, Inc., which is a subsidiary of Rentokil Initial, Inc.

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V. Reference to reported decision.

The Bankruptcy Court decision is not reported. The District Court decision is not reported. The Eleventh Circuit affirmed without an opinion in an unpublished order that is not reported.

VI. Grounds on which the Supreme Court has jurisdiction.

The Court of Appeals for the Eleventh Circuit rendered its decision on September 30, 2002. The Court denied Application for Rehearing and Rehearing En Banc on December 2, 2002. The Supreme Court of the United States has jurisdiction to review by Writ of Certiorari the decisions of the United States Court of Appeals for the Eleventh Circuit pursuant to 29 USC §2101.

VII. Statutes involved in this decision

The jurisdictional provision relating to Bankruptcy actions is involved in this decision. The statute states:

> (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under Title 11.
>
> (b) Notwithstanding any act of Congress that confers exclusive jurisdiction on a court or other courts other than the district

courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under Title 11 or arising in or related to cases under Title 11.

28 USC §1334(a) and (b).

Removal of claims related to bankruptcy cases

(a) A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

(b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order entered under this subsection remanding a claim or cause of action, or a decision to not remand, is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the

United States under section 1254 of this title.

28 USC §1452 (a) and (b).

VIII. Statement of the Case and Facts

Charles Cleveland, an attorney and shareholder of Cleveland & Cleveland, P. C. (Cleveland) was employed by BBL Group, Inc. (BBL) to represent BBL, a debtor and debtor-in-possession in its Chapter 11 bankruptcy petition. The Bankruptcy Court approved BBL's employment of Cleveland. Upon instructions from the President and court appointed representative of BBL, Cleveland represented BBL in appealing the confirmation order, primarily the portion of the order that dismissed a fraud lawsuit BBL had against a creditor. Cleveland then applied to the Bankruptcy Court for his fee to be paid as a priority administrative expense of the estate. Cleveland's application was denied by the Bankruptcy Court and the District Court on the grounds that the services did not benefit the estate or any creditor, the District Court ruled that Cleveland's fee should be recovered from the debtor or its principals. This judgment was not appealed and is now the law of the case. The confirmation order was implemented with BBL surviving bankruptcy, having assets returned to it, and resuming its farming operations and other businesses.

BBL, having survived Bankruptcy, received a bill from Cleveland for the fees which the Bankruptcy Court had determined were not a priority administrative claim but would be due from the debtor. BBL refused to pay the bill, contending that the fees were denied by the

Bankruptcy Court.

Cleveland & Cleveland, P. C. and Charles Cleveland (Cleveland) initiated this case in the Circuit Court of Jefferson County, Alabama on July 14, 1999. The complaint named BBL as the only defendant and alleged a claim of breach of contract and a claim for work and labor done relating to representation of BBL in the District Court for the Northern District of Alabama and in the Court of Appeals for the Eleventh Circuit. The complaint alleged that Cleveland had applied to the Bankruptcy Court to have the fee paid as a priority administrative claim from the assets of the bankruptcy estate and that the Bankruptcy Court had denied priority administrative status stating that Cleveland could seek the fees from the debtor (defendant, now former debtor, BBL).

BBL removed the case to the Bankruptcy Court for the Northern District of Alabama (Southern Division) contending that the prior Bankruptcy Court decision was *res judicata* or that the claim was barred by *collateral estoppel* giving the Bankruptcy Court jurisdiction under 28 USC §1334. Cleveland filed a motion to remand contending that *res judicata* and *collateral estoppel* were defenses that did not provide the court with jurisdiction of the claim pursuant to *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470 (1998), the Bankruptcy Court having exercised and exhausted its jurisdiction. The Bankruptcy Court denied the motion to remand and an interlocutory appeal was taken.

BBL filed an answer denying liability and asserting *res judicata* and *collateral estoppel* as affirmative defenses and asserting as a counter claim that a conflict of interest required disgorgement of fees previously paid to Cleveland as a priority administrative claim.

Both parties filed motions for summary judgment. Cleveland contended that *res judicata* and *collateral estoppel* did not apply to its claim relying on *In re: Engle*, 124 F.3d 567 (3rd Cir. 1997) and the language of the District Court order allowing Cleveland to seek fees from the debtor as well as summary judgment on the counterclaim. BBL's motion for summary judgment contended that *res judicata* and *collateral estoppel* did preclude Cleveland's claim and that a conflict of interest required disgorgement by Cleveland of previously paid funds. The Bankruptcy Court granted BBL's motion as to Cleveland's claim holding that Cleveland's claim was barred by *res judicata* and *collateral estoppel* under authority of *In re: Gantz*, 209 B.R. 999 (10th Cir. BAP, 1998). The Bankruptcy Court granted Cleveland a summary judgment on the conflict of interest disgorgement claim.

Cleveland appealed the summary judgment in favor of BBL on the *res judicata/collateral estoppel* claim and the appeal was consolidated with the pending jurisdictional appeal. BBL did not cross appeal the summary judgment in favor of Cleveland on the conflict of interest disgorgement claim.

The Northern District of Alabama affirmed the Bankruptcy Court holding that the federal court had jurisdiction and that *collateral estoppel* and *res judicata* precluded Cleveland's claim. Cleveland's motion for reconsideration was denied. Cleveland appealed to the Court of Appeal for the Eleventh Circuit.

The Eleventh Circuit Court of Appeals affirmed the District Court, without opinion, on September 30, 2002 and denied the Application for Rehearing and Rehearing *En Banc* on December 2, 2002.

The facts relevant to the issues before this court are straight forward and undisputed. Cleveland incurred $43,153.58 in attorney fees representing BBL in appealing the confirmation order entered in the Bankruptcy case to the District Court and to the Court of Appeals. Cleveland presented a claim to the Bankruptcy Court to have the fee paid as a priority administrative claim from the bankruptcy estate's assets. The Bankruptcy Court and the District Court determined that the services were performed and the fees were reasonable, but were not due as a priority administrative claim from the bankruptcy estate, and that Cleveland's recourse was against the debtor or its principals. BBL survived bankruptcy, had assets returned to it, and commenced operation of its business again after the implementation of the confirmation order. Cleveland now claims the fee from the former debtor, his client, BBL.

IX. Argument

A. In taking jurisdiction of this case, the lower courts departed from the accepted and usual course of judicial proceeding, including the failure to follow a decision of the Supreme Court.

Rivet v. Regions Bank of Louisiana, 522 US 470 (1998) should have been dispositive of this case. This case does not arise under Title 11 any more than the second *Rivet* case did i.e. not at all. The bankruptcy court has done all of its work and concluded its jurisdiction with final judgments holding that Cleveland's attorney fee claim is not entitled to administrative priority from the estate but that BBL, the former debtor, can pay it. In attempting to reassert jurisdiction to decide the defense of *res judicata/collateral estoppel*, the Bankruptcy Court , the District Court, and the Circuit Court so departed from the accepted and usual course of judicial proceedings, as set forth in *Rivet*, as to call for the exercise of the supervisory power of the Supreme Court.

The courts below accepted the proposition that the Bankruptcy Court had jurisdiction because the claim related to or arose in a pending bankruptcy case. Cleveland's claim did not have any impact on the bankruptcy estate, the administration of the estate, or distribution of payment from the estate. Cleveland attempted to do those things when he applied to the Bankruptcy Court for payment as a priority administrative claim. The Bankruptcy Court exhausted its jurisdiction when it determined that the claim was not an

administrative claim payable from assets of the estate under the administration of the Bankruptcy Court.

This case does not seek to relitigate the fee application because the Bankruptcy Court conclusively determined that Cleveland's fees, at issue here, are not a priority administrative claim payable from the bankruptcy estate ahead of all other creditors, but would be payable by either the debtor or its principals under state common law rules.

The Eleventh Circuit decision directly conflicts with *In re Engle*, 124 F. 3d 567, 577 (3rd Cir. 1997) wherein it was held that a bankruptcy court decision denying administrative priority to an attorney fee claim did not impact on the attorney recovering the fees from the debtor.

As Cleveland is not seeking funds in the hands of the bankruptcy estate and the bankruptcy plan has been confirmed and implemented with assets in excess of creditor claims having been returned to BBL, the relief requested by Cleveland can be obtained in state court. Merely because work is performed in appealing an order of the Bankruptcy Court does not provide the Bankruptcy Court with jurisdiction of the fee incurred. Any jurisdiction the Bankruptcy Court had was related to whether the fee was due to be paid from assets of the estate being administered in the Bankruptcy Court. Any such jurisdiction ended once the Bankruptcy Court said that Cleveland should collect the fee from the debtor, not as an administrative claim in the estate.

The Eleventh Circuit relied on *In re Gantz*, 209 B.R. 999 (10th Cir. BAP, 1998) and *Jenson v. United States Trustee*, 221 B.R. 782 (10th Cir. BAP, 1998). These cases, as applied by the Eleventh Circuit,[1] and the Eleventh Circuit decision in this case conflict with *In re: Engle*, 124 F.3d 567, 577 (3rd Cir. 1997). We have a clear conflict in the circuits with the Tenth[1] and Eleventh on the side that the Bankruptcy Court has jurisdiction and the Third on the side that there is no jurisdiction. Of course *Rivet* holds that the judgments and any preclusive effect they have do not permit jurisdiction. Consequently, the Tenth and Eleventh Circuit are in conflict with *Rivet*, whereas the Third Circuit is not.

In the court below Cleveland's fee was denied as an administrative priority claim on the grounds that the debtor, not the creditors should pay the bill under the authority of *In re: Storms*, 101 B.R. 964 (Bkrtcy. S.D. Cal., 1989). When Cleveland sought to collect from the debtor, the court switched circuits and applied *In re: Gantz*, 209 B.R. 999 (10th Cir. BAP, 1998) while Cleveland was relying on *Storms* and *In re: Engle*, 124 F.3d 567 (3rd Cir. 1997).

The uncertainty created by these conflicting circuits will chill bankruptcy practice and deprive debtors of counsel because counsel will not work if they will not get paid and know who to look to for payment. As long as *Engle* was the only authority on the issue there was no

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[1]We contend that the Eleventh Circuit misapplied *Gantz* and *Jenson* and that properly construed these cases should not conflict with *Engle*.

worry as to payment.

Without intervention by the court, this situation is bound to reoccur and destabilize the bankruptcy process.

B. The Eleventh Circuit decision that *res judicata* or *collateral estoppel* bars Cleveland from collecting the fee that the Bankruptcy Court said could be collected from the debtor is in direct conflict with the Third Circuit holding that such a bankruptcy decision has no impact on the attorney's ability to collect such fees from the debtor.

The Eleventh Circuit decision in this case directly conflicts with the Third Circuit holding in *In re: Engle*, 124 F.3d 567 (3rd Cir. 1997). *Engle* says that the denial of administrative priority claim status does not preclude the attorney from collecting the fee from the debtor. The Eleventh Circuit order holds that Cleveland was precluded by *res judicata* and/or *collateral estoppel*. There is no way to reconcile or distinguish these cases. Only the intervention of this court can resolve this conflict.

Engle represents the correct line of reasoning and should be adopted by the court. Bankruptcy Courts handle matters in discrete packets and only address the precise issues relevant to decide a particular matter; consequently, an order is final in the bankruptcy context when it "finally determines the discrete issue to which is it addressed." *In re: Allen*, 896 F.2d 416, 418 (9th Cir. 1990); *In re: Apex Oil Co.*, 884 Fed. 343 (8th Cir. 1989); and *Bank of New England Corp.*, 218 B.R. (BAP 1st Cir. 1998).

Consequently, bankruptcy court decisions are to be limited to the phrase or discrete claim and are not *res judicata* as to other claims, even similar ones. *Matter of Briniff Airway, Inc.*, 783 F.2d 1283 (5th Cir. 1986).

It therefore stands to reason that when the bankruptcy court is addressing the issue of what attorney fees are a priority administrative claim to be paid from the debtor's estate prior to any payment to any creditors, the order is limited to just that issue. *In re: Engle*, 124 F.3d 567 (3rd Cir. 1997) recognizes this limitation, holding that the fact that the attorney fee is not entitled to administrative priority payment in advance of creditors from the assets held in trust does not preclude the attorney from subsequently recovering the fee directly from the debtor in a post bankruptcy collection. In fact, the District Court in supervising the Bankruptcy Court recognized this in the order itself when the court said that Cleveland could seek recourse against the debtor or its principals.

The Eleventh Circuit decision in this case forces attorneys to ask the bankruptcy court to determine fees due for criminal defense, divorce, denial of discharge, and other issues that the courts have held are not fees payable from the estate as a priority administrative claim. Under the Eleventh Circuit holding, none of these are fees paid as administrative claims, yet all would be required to be decided along with administrative claims payable from the estate for fear that later the court would hold that the fee claim is barred and should be made in the Bankruptcy Court. This would certainly clog the Bankruptcy Court docket.

Resolution of this issue by the court would greatly assist the Bankruptcy Courts and the bankruptcy bar by resolving the conflict in the circuits.

X. Conclusion

For the foregoing reasons, petitioners request the Court to issue a Writ of Certiorari to the Eleventh Circuit Court of Appeals to address the issues presented in this petition.

Respectfully submitted by:

Kenneth Lee Cleveland
Counsel of Record For Petitioners
Cleveland & Cleveland, P. C.
2330 Highland Avenue South
Birmingham, Alabama 35205
(205) 322-1811
(205) 322-1848 (fax)
E-mail: ClevelandAtty@hotmail.com

Dated: May 5, 2003

Appendix

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Filed
U.S. Court of Appeals
Eleventh Circuit
DEC 02 2002
Thomas K. Kahn
Clerk

No. 01-14458-EE

In Re:

BENJAMIN B. LOFTON,

Debtors.

CLEVELAND & CLEVELAND, P.C.,
CHARLES CLEVELAND,

Plaintiffs-Appellants,

versus

BBL GROUP, INC.,

Defendants-Appellee.

On Appeal from the United States District Court for the Northern District of Alabama

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ON PETITION (S) FOR REHEARING AND PETITION (S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19 __, ____F.2d ____).

BEFORE: DUBINA, MARCUS and GOODWIN*, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE

*Honorable Alfred T. Goodwin, U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

ORD-42
(12/01)

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Filed
U.S. Court of Appeals
Eleventh Circuit
DEC 02 2002
Thomas K. Kahn
Clerk

No. 01-14458-EE

In Re:

BENJAMIN B. LOFTON,

Debtors.

CLEVELAND & CLEVELAND, P.C.,
CHARLES CLEVELAND,

Plaintiffs-Appellants,

versus

BBL GROUP, INC.,

Defendants-Appellee.

On Appeal from the United States District Court for the Northern District of Alabama

---

BEFORE: DUBINA, MARCUS and GOODWIN*, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by appellants, is DENIED.

ENTERED FOR THE COURT:

/s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE
*Honorable Alfred T. Goodwin, U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

ORD-41

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-14458-EE

D.C. Docket Nos. 00-00031 CV-G-E
1:95-42423 BK

In Re:

BENJAMIN B. LOFTON,

Debtors.

CLEVELAND & CLEVELAND, P.C.,
CHARLES CLEVELAND,

Plaintiffs-Appellants,

versus

BBL GROUP, INC.,

Defendants-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama

(September 30, 2002)

BEFORE DUBINA, MARCUS and GOODWIN*, Circuit Judges.

PER CURIAM

AFFIRMED. See 11th Cir. R. 36-1.[2]

*Honorable Alfred T. Goodwin, U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

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[2]11th Cir. R. 36-1 provides:
When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

©) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) judgment has been entered without a reversible error of law; and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

UNITED STATES DISTRICT COURT
NORTHERN DIVISION OF ALABAMA
EASTERN DIVISION

In re: BBL GROUP, INC., Debtor.	)	
In re: BENJAMIN B. LOFTON, Debtor.	)	
* * * *	)	CIVIL ACTION NO.
	)	00-G-0031-E
CLEVELAND & CLEVELAND, P.C. and CHARLES	)	
CLEVELAND,	)	CIVIL ACTION NO.
	)	00-G-1174-NE
Appellants,	)	
v.	)	
BBL GROUP, INC.,	)	
Appellee,	)	
	)	
CLEVELAND & CLEVELAND, P.C. and CHARLES	)	
CLEVELAND,	)	
Plaintiffs,	)	
v.	)	
BBL GROUP, INC.,	)	
Defendant.	)	

MEMORANDUM OPINION

Pursuant to jurisdiction granted by 29 U.S.C. §158(a)(1) the instant case is an appeal of a final judgment entered in a core proceeding by the Honorable James S. Sledge, U.S. Bankruptcy Judge, pursuant to 28 U.S.C. §§157

and 1334. This court has been asked to decide whether the final order of the Bankruptcy Court disallowing attorney fees precludes the state court action by *res judicata* or collateral estoppel and is a correct determination.

This proceeding arises from the jointly-administered bankruptcy cases of Benjamin B. Lofton [hereinafter Lofton} and his wholly-owned company BBL Group, Inc. [hereinafter BBL]. Upon the expiration of the "exclusive period"[1] Talent Tree Staffing Services, Inc. [hereinafter Talent Tree], possessor of a pledge of Lofton's stock in BBL,[2] proposed a plan of reorganizatin, known as "The BBL Plan" which included the following provisions:

1) payment in full of all claims of BBL creditors other than Talent Tree;

2) compromise of BBL's claims against Talent Tree; and

3) cancellation of Lofton's stock in BBL (Talent Tree's collateral), and the issuances of new stock to Talent Tree in cancellation ob BBL's debt to Talent Tree.

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[1]The Bankruptcy Code, 11 U.S.C. §1121, allows debtors to proceed exclusively in good faith to solicit support for their timely plan of reorganization for a period of 180 days.

[2]Lofton was the president of BBL.

All creditors approved "The BBL Plan," as did Talent Tree, pledgee of Lofton's BBL stock and holder of Lofton's stock proxy. Lofton objected to the confirmation of "The BBL Plan," as did Charles Cleveland[3] who filed an objection on behalf of the estate.

On September 20, 1996, the Bankruptcy Court confirmed "The BBL Plan" over the objections of Lofton and Cleveland. Cleveland, on behalf of BBL, filed a notice of appeal of the BBL confirmation order and a motion for stay of execution. Lofton filed an identical notice and motion for stay pending appeal.[4]

The case at bar is an action by former counsel for a Chapter 11 debtor-in-possession to recover disallowed legal fees from assets of the debtor's estate that have been vested in the reorganized debtor.[5] Pursuant to "The BBL

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[3]Plaintiffs Cleveland & Cleveland, P.C. and Charles Cleveland [hereinafter Cleveland] served as bankruptcy counsel for BBL. Lofton appeared *pro se*.

[4]Lofton's motion was filed on the same day prior to the time it could have been received by certified mail. Lofton lived in St. Clair County at the time. Plaintiffs contend that Cleveland allowed Lofton, whose interest were adverse to those of the estate, to copy his pleadings before he served them.

[5]By the confirmed plan of reorganization only professional fees allowed by the Bankruptcy Court may be paid. Cleveland and his law firm filed an application for compensation for legal services rendered between October 1, 1996, and March 4, 1997, relating to appeals taken by BBL form the Bankruptcy Court's orders confirming the plans of

Plan" providing for payment of professional fees and expenses as :allowed: by the Bankruptcy Court, Cleveland filed his Second Interim Application for Compensation by Counsel for BBL [hereinafter Cleveland's Second Interim Application]" on March 7, 1997. In his application he sought compensation for services rendered in opposing confirmation of "The BBL Plan" and appealing the BBL Confirmation Order. Both Talent Tree and the Bankruptcy Administrator objected to Cleveland's Second Interim Application.[6] The objections were sustained by the Bankruptcy Court, with the notation on record that if Cleveland had engaged in any activity giving rise to a conflict of interest between the interest of Lofton and BBL then all fees previously awarded to Cleveland in the BBL case would be subject to disgorgement pursuant to 11

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the reorganization proposed for BBL and Lofton.

[6]Talent Tree objected because Cleveland's services were rendered pursuant to Lofton's instructions for the benefit of Lofton only who opposed the plan. The services conferred no benefit on the estate of BBL (services rendered in resisting the cancellation of Lofton's stock, in the personal bankruptcy case of Lofton opposing the plan in which BBL had no interest, and consultations with Lofton regarding undisclosed matters).

U.S.C. §§327,[7] 328(c)[8] under the authority of *In re Prince*,[9] 40 F.3d 356 (11th Cir. 1994) on grounds that Cleveland was not a "disinterested party."[10] In discussing the sanction of

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[7]"Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying ut the trustee's duties under this title." 11 U.S.C. §327(a).

[8]"Except as provided in section 327(a), 327(e), or 1107(b) of this title, the court may deny allowance of compensation for services and reimbursement of expenses of professional person employed under section 327 or 1103 of this title if, at any time during such professional person's employment under section 327 or 1103 of this title, such professional person is not a disinterested person, or represents or holds an interest adverse to the interest of the estate with respect to the matter on which such professional person is employed."

[9]The Eleventh Circuit held the following: 1) law firm's prior representation of debtor and nondebtor spouse in estate planning matters and prior representation of debtor's corporation created conflict of interest justifying denial of professional fees for representation of debtor in bankruptcy; 2) law firm was not "disinterested person" entitled to compensation; and 3) complete denial of fees received was warranted.

[10]"The definition of a "disinterested person" includes a person that "(A) is not a creditor..." and '(E) does not have an interest adverse materially to the estate ... by reasons of any direct or indirect relationship to, connection with, or interest in, the debtor ..., or for any other reasons. 11 U.S.C.§101(14)." *In re Prince* at 360.

complete denial of fees the *Prince* court said: "While a complete denial of fees may be extreme in some instances, this case requires nothing less. 'This sanction serves to deter future wrongdoing by those punished and also to warn others who might consider similar defalcations.' *Gray*, 30 F.3d at 1323."

The Bankruptcy Court denied payment of the fees as an administrative expense from the bankruptcy estate because the services did not benefit the bankruptcy estate.[11] The bankruptcy decision was upheld by U.S. District Judge William M. Acker, Jr. By order of December 16, 1997. A portion of Judge Acker's opinion follows:

> [I]n his testimony before the Bankruptcy Court, Cleveland indicated that the only beneficiaries of the appeal efforts would be BBL and/or its sole shareholder, Lofton. ...[I]t was not error for this court to have agreed with the Bankruptcy Court that appellants' services were "unnecessary" such that they did not constitute a compensable benefit to BBL's estate.
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> ...

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[11]The assets of the BBL bankruptcy estate consisted primarily of a farm, a non-assignable Maryland lottery ticket entitling BBL to receipt of payments of $175,000.00 per year for twenty years, and claims in litigation against its largest creditor Initial Staffing Services, Inc. f/k/a Talent Tree Staffing Services, Inc.

> [T]he great weight of authority holds that where, as here, services provided by counsel for the debtor-in-possession afford no benefit to the *bona fide* creditors of the estate, such services are not compensable from the debtor's estate. *See e.g.*, In re Reed, 890 F.2d 104, 105 (8th Cir. 1989)(noting that legal services that benefit Chapter 11 debtor only are not compensable from debtor's estate); In re Word of Faith Fellowship, Inc., 1997 WL 527852 at *4 (Bankr. N.D.Ill.)(same); In re Office Products of America, Inc. 136 B.R. 983, 986 (Bankr. W.D. Tex. 1992) (same). As one court has observed, "[i]t is more appropriate that since such services benefitted only the debtor [or its principals], they be paid for by only the debtor [or its principals]. In re Storm, 101 B.R. 645, 648 (Bankr. S.D.Cal. 1989).

The Eleventh Circuit affirmed the order and following its mandate "The BBL Plan" was consummated. Lofton's BBL stock was canceled, new stock was issued to Talent Tree, the BBL farm and assets were sold, and creditors were paid. All property left in the estate of BBL vested in the reorganized BBL owned by Talent Tree.[12]

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[12]The effect of "The BBL Plan" was that Talent Tree, whose debt was entitled to priority over Lofton's interest as shareholder, received ownership of the Reorganized BBL in cancellation of its debt.

Citing dictum, appellants misinterpreted Judge Acker's opinion as a suggestion that plaintiffs seek recourse from the debtor,[13] ignoring his decision that Cleveland **could not get his fee** from the estate.

Cleveland filed his Final Fee Application stating that "*no additional fee is requested.*" In reliance thereon Reorganized BBL and Talent Tree did not object to it.[14] On April 12, 1999, the Bankruptcy Court entered its Order on Final Application for Payment of Professional Fees approving Cleveland's Final Fee Application in which the denied fees were not claims under "The BBL Plan." Thereafter, plaintiffs made a demand for payment and filed suit in state court July 14, 1999, seeking to collect their disallowed fees from the same assets of the debtor's estate.[15] The defendant removed the case to the Bankruptcy Court which awarded a summary judgment against appellants and in favor of the reorganized debtor on two grounds: 1) appelants' claims are disallowed fees barred by *res judicata* and collateral estoppel; and 2) appellants' services were not "authorized" by the reorganized debtor. The court found that Cleveland

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[13]Cleveland claims that Judge Acker "determined" that the Disallowed Fees were to be paid by Talent Tree as owner of Reorganized BBL.

[14]Talent Tree maintains that had Cleveland disclosed his intent to request additional fees it would have objected to the Final Fee Application based on Cleveland's lack of "disinterestedness" under § 328©).

[15]These assets are now vested in the reorganized debtor Talent Tree pursuant to the confirmed plan.

presented no authority that a reorganized debtor is liable for professional services rendered to the debtor-in-possession when all assets of the reorganized debtor came from the debtor-in-possession via a confirmed plan. The Bankruptcy Court correctly noted that Cleveland's claim for Disallowed Fees would amount to an "end run" of 11 U.S.C. § 330 which provides that all compensation of professionals retained by debtors must be approved by the Bankruptcy Court. Thereafter, plaintiff moved to remand, contested the jurisdiction of the Bankruptcy Court, and requested abstention. Asserting its jurisdiction, the Bankruptcy Court declined to abstain, and denied the motion to remand. Cleveland has appealed the determination that *res judicata* and collateral estoppel prevent his proceeding in state court. He has not appealed the Bankruptcy Court's ruling that his services were never authorized by the Reorganized Debtor.

"The doctrine of res judicata is one of finality, providing that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights and responsibilities of the parties and their privies." *Baptiste v. C.I.R.*, 29 F.3d 1533, 1539 (11th Cir. 1994), *aff'd in part, rev'd in part*, 29 F.3d 433 (8th Cir 1994), *cert. Denied*, 513 U.S. 1190, 115 S.Ct. 1251, 131 L.Ed2d 133 (1995). Continuing, the court went on th say the following:

> As to the parties to the prior proceeding and their privies, res judicata constitutes an absolute bar to a subsequent judicial proceeding involving the same cause of action.
>
> ...

> The application of res judicata requires that: (1) the issue contested in both proceedings be identical; (2) the parties to the subsequent proceeding are the same as, or are in privity with the parties to the earlier proceeding; and (3) the earlier proceeding resulted in a final judgment on the merits.

Id.

Res judicata is applicable in the instant case based on the following final, non-appealable orders of the court: the BBL Confirmation Order (affirmed by the District Court and the Eleventh Circuit Court of Appeals); the order sustaining the objections of Talent Tree and the Bankruptcy Administrator to Cleveland's Second Fee Application; and the Final Fee Order. "The BBL Plan" provides only for the payment of "allowed" professional fees and not for the disallowed ones. In its Interim Fee Order the Bankruptcy Court sustained Talent Tree's objection, expressly concluding that Cleveland's services conferred no benefit upon the BBL estate and that Cleveland's fees should not be paid from property of the estate being vested in the reorganized BBL under "The BBL Plan." Upon appeal of the Interim Fee order Judge Acker affirmed the Bankruptcy Court's disallowance of Cleveland's fees. This disallowance became final when the Bankruptcy Court entered its Final Fee Order on Cleveland's fee application which had omitted the disallowed fees. The court holds that Cleveland's claim is barred by *res judicata*. He seeks payment from the same funds from which he has been denied access. He seeks payment from the same real-party-in-interest that the court has determined does not owe him.

The doctrine of collateral estoppel, or issue preclusion, provides that "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude re-litigation of the issue in a suit on a different cause of action involving a party to the first case." *Mike Smith Pontiac v. Mercedes-Benz of No. America*, 32 F.3d 528, 532 (11th Cir. 1994), *cert. Denied*, 516 U.S. 1044, 116 S. Ct. 702, 133 L. Ed2d 659 (1996). Again, the court went on to elaborate as follows:

> This circuit has previously established three prerequisites to the application of collateral estoppel: (1) the issue at stake must be identical to the one alleged in the prior litigation; (2) the issue must have been actually litigated in the prior litigation; and (3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in that earlier action. ... Further, the party against whom the earlier decision is asserted must have had a full and fair opportunity to litigate the issue in the earlier proceeding.

32 F.3d at 532.

In the Interim and Final Orders of the Bankruptcy Court the court found that Cleveland's services conferred no benefit upon BBL's estate and that Cleveland's fees were not due from the assets being vested in Reorganized BBL under "The BBL Plan." Cleveland is thus precluded from re-litigating the issue of whether his services conferred any benefit upon BBL's creditors. The court, in *In re Southmark*

Corp., 163 F.3d 925, 934 (5th Cir. 1999), *cert. denied*, 527 U.S. 1004, 119 S.Ct. 2339, 144 L. Ed2d 236 (1999), in determining whether two suits involve the same claim or cause of action adopted the transactional test of the Restatement (Second) of Judgments § 24: "whether the two actions under consideration are based on *' the same nucleus of operative facts.'"* The court holds that this action arises from the same "nucleus of operative facts" as Cleveland's Second Interim Fee Application and Final Fee Application. It has already been determined that the disallowed fees were never owed by Reorganized BBL. *See, In re Abraham*, 221 B.R. 782 785 (10th Cir. BAP 1998)("[A] requested fee that is disallowed cannot be collected since it was never due); *In re Gantz*, 209 B.R. 999 (10th Cir. 1997) (disallowed fees are not collectible because they are not owed by the debtor). Cleveland cannot collect these fees. The court holds that Cleveland's claims are barred by collateral estoppel.

The court further holds that Cleveland is barred from asserting claims for fees because his services were not necessary and conferred no benefit on the Reorganized BBL. Because Cleveland was actually representing the interests of Lofton his services could not possibly have conferred any benefit upon BBL, the estate of BBL, or Reorganized BBL. His services were not necessary as required by § 330.

Cleveland was not a "disinterested person" under 327(a) and § 328(c). Throughout the course of the bankruptcy cases Cleveland has represented the interests of Lofton as the sole beneficiary of avoidance of claims against Talent Tree. As such he had a conflict of interests. There is a long established policy that an attorney must not

represent opposing interest. *See, In re Paine*, 14 B.R. 272, 274 (W.D. Mich. 1981) (Bankruptcy judge possesses discretionary power to deny attorney fees solely upon the basis that the attorney's representation is subject to conflicting interests).[16] In addition Alabama Rules of Prof'l Conduct 1.7 and 1.9 require a lawyer to exercise independent professional judgment on behalf of a client. In the case of a corporate client this independence of professional judgment is to the entity itself and not its individual stockholders, directors, officers, or employees. *In re Temp-Way Corp.*, 95 B.R. 343 (E.D.Pa. 1989); *Matter of King Resources Co.*, 20 B.R.191 (D.Colo. 1982).

In the context of bankruptcy 11 U.S.C. § 328(c) expressly allows the bankruptcy court to deny compensation where counsel is not disinterested or represents an interest adverse to the estate. *See, In re Alcon Corp.*, 168 B.R. 822 (Bankr. D.R.I. 1994) (Conflict of interest and lack of benefit to estate precluded compensation for

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[16]The *Paine* court, at 274, set forth that this long established practice of an attorney's not representing conflicting interests was established by common law by the Seventeenth Century. *Shire v. King*, Yelverton 32. Anonymous, 7 Modern 47. "Put succinctly, 'when an actual conflict of interest exists, no more need be shown ... to support a denial fo compensation.'" 14 B.R. at 274. The court noted that the denial of fees in such circumstances had been expressed by the Supreme Court and numerous lower courts in expression of "a strong federal policy against attorneys representing conflicting interests." 14 B.R. at 275.

attorney). As in the case at bar,[17] The *Alcon* court said the following:

> [O]n conflict of interest grounds, we rule that Mr. Pitts is precluded from receiving any compensation in this case. No only were Mr. Pitts' efforts throughout this case of no benefit to the Estate, but because of his allegiance to his "other client," they were actually intended to be counterproductive to the interests of the Debtor and its creditors.

See 7A C.J.S. *Attorney & Client*, § 287(b) Conduct of Attorney (Adverse interests) (1980); 7 Am Jur, *Attorneys at Law*, § 280. Representing adverse interests. (1997).

It is clear that Cleveland's actions have been for the benefit of Lofton who by court order was removed from office and lost his stock. Cleveland could not represent both Lofton and the estate. Such an attempt is unthinkable. As the court in *Woods v. City Nat. Bank & Trust Co. of Chicago*, 312 U.S., 262, 269, 61 S. Ct. 493, 85 :L. Ed 2d 820, 826 (1941), *reh'g denied*, 312 U.S. 715, 61 S. Ct. 736, 85 L. Ed 1145 (1941), *reh'g denied*, 312 U.S. 715, 61 S. Ct. 736, 85 L. Ed 1145 (1941), said:

> A fiduciary who represents security holders in a reorganization may not perfect his claim to compensation by insisting that although he had conflicting interests, he served his several

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[17]Cleveland's efforts were on behalf of Lofton and adverse to those of the estate and creditors.

> masters equally well or that his primary loyalty was not weakened by the pull of his secondary one.

This court agrees. The Bankruptcy Court has ruled that he could not collect his fees from the estate. Judge Acker has ruled that the could not recover his fees from the estate. This is the law of the case. Cleveland is precluded from bringing suit to collect his fees in a state court action. Removal to the Bankruptcy Court was proper. The state court suit is barred by *res judicata* and collateral estoppel.

An order consistent with this opinion is being entered contemporaneously herewith.

DONE and ORDERED this 23rd day of July, 2001.

/s/ J. Foy Guin, Jr.
UNITED STATES DISTRICT JUDGE
J. FOY GUIN, JR.

UNITED STATES BANKRUPTCY COURT

Northern District of Alabama, Eastern Division

In re:	}	
BBL GROUP, INC.,	}	CASE NO. 95-42424-JSS-11
Debtor	}	CHAPTER 11
		(Jointly Administered With)
In re:	}	
BENJAMIN B. LOFTON,	}	CASE NO. 95-42423-JSS-11
Debtor	}	CHAPTER 11
CLEVELAND & CLEVELAND, P. C. and CHARLES CLEVELAND,		
Plaintiff	}	
versus	}	A.P. NO. 99-00273-JSS
BBL GROUP, INC.,	}	
Defendant	}	

SUMMARY JUDGMENT

This adversary proceeding came before the Court for hearing on Plaintiff's Motion for Partial Summary Judgment and Entry of Proposed Findings of Fact and Conclusions of Law. At the hearing, the parties jointly moved to hear the Defendant's counter motion for summary judgment, which this Court granted. This

adversary proceeding is a removed action seeking to collect attorney fees incurred during the pendency of the Debtor's title 11 case. The Defendant counter-claimed seeking to recover attorney fees already approved and paid to the Plaintiff. Present for the hearing was Kenneth Cleveland and Charles Cleveland for the Plaintiffs, and David Anderson and Chris Glenos for the Defendant. Upon the presentation of oral argument, this Court determines that summary judgment is appropriate unto the Defendant-Debtor upon the claims of the Plaintiff, and that summary judgment is appropriate unto the Plaintiff upon the counter-claim of the Defendant. Upon those determinations, the parties moved for denial of the Rule 11 sanction motion pending before this Court in this Adversary Proceeding.

Accordingly, upon the findings of fact and conclusions of law stated upon the record in open court;

IT IS ORDERED, ADJUDGED, AND DECREED that the Motion for Summary Judgment by the Defendant-Debtor on the Plaintiff's Complaint and Claims, be and is hereby **GRANTED** in favor of the Defendant-Debtor, BBL Group, Inc. and against the Plaintiffs, Cleveland & Cleveland, P.C. and Charles Cleveland.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Motion for Summary Judgment by the Plaintiffs on the Defendant's Counter-Claims, be and is hereby **GRANTED** in favor of the Plaintiffs, Cleveland & Cleveland, P.C. and Charles Cleveland and against the Defendant, BBL Group, Inc.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Plaintiff's Motions for Rule 11 Sanctions (**Doc. Nos. 38 and 39**), be and are hereby **DENIED**.

IT IS FURTHER ORDERED, AND DIRECTED that the Clerk of this Court shall send a copy of this summary judgment through the Bankruptcy Noticing Center to each of the following (which shall be sufficient service and notice hereof): the Plaintiffs, the Defendant, the Bankruptcy Administrator, and their respective counsel.

Done at Anniston, Alabama this the 13th day of April, 2000.

/s/ Jas S Sledge
JAMES S. SLEDGE
UNITED STATES
BANKRUPTCY JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DIVISION OF ALABAMA
EASTERN DIVISION

In re:	}	Bankruptcy Case No. 95-42423
BBL GROUP, INC.,	}	
Debtor.	}	(jointly administered with 95-42424)
In re:	}	
BENJAMIN B. LOFTON,	}	
Debtor.	}	
Ex parte:	}	
CHARLES CLEVELAND AND CLEVELAND & CLEVELAND, P.C.,	}	
Appellants,	}	CIVIL ACTION NO.
vs.	}	CV-97-AR-1426-E
TALENT TREE STAFFING SERVICES, INC., AND ROBERT J. LANDRY, III, U.S. BANKRUPTCY ADMINISTRATOR	}	

Appellees. }

MEMORANDUM OPINION AND ORDER

On March 4, 1997, appellants, Charles Cleveland ("Cleveland") and his law firm, Cleveland & Cleveland, P. C., counsel for BBL Group, Inc. ("BBL"), the debtor-in-possession in the above-entitled bankruptcy action, filed an application for compensation from the BBL estate for legal services rendered between October 1, 1996, and March 4, 1997. The legal services in question relate to appeals taken by BBL from the Bankruptcy Court's orders confirming the plans of reorganization proposed for BBL and Benjamin Lofton ("Lofton"). On April 23, 1997, the Bankruptcy Court heard testimony from Cleveland at a hearing on his fee application. Following Cleveland's testimony, the Bankruptcy Court found that appellants had not shown that their services benefitted the estate as required by 11 U.S.C. §330(a). As a result, the Bankruptcy Court denied appellants' fee application on April 24, 1997. This court affirmed the Bankruptcy Court's decision on December 3, 1997. Appellants now ask this court to reconsider its decision.

In reviewing the Bankruptcy Court's decision, the sole question before this court was whether the Bankruptcy Court abused its discretion when it determined that appellants' legal services had not benefitted the BBL estate. The principal thrust of appellants' instant motion is that, when this court affirmed the decision of the Bankruptcy Court, it ran afoul of the rule announced in Grant v. George Schumann Tire & Battery Co., 908 F.2d 874 (11th Cir. 1990), a case previously cited by appellants. Having carefully

reread Grant, the court finds appellants' reliance on Grant to be misplaced in two significant respects.

First, Grant deals primarily with the issues of fee enhancement and the payment of interest. Therefore, it sheds no real light on the issues in this case, which does not deal with fee enhancement or interest. Moreover, to the limited degree that Grant does discuss the concept of "benefit to the estate," it does so only to say that, when the trustee's counsel defends the debtor's appeal of his fee award, those services do not result in a compensable benefit to the debtor's estate. Id. At 882-83. Therefore, as the Bankruptcy Court observed below, Grant is inapposite.

Second, if, as appellants suggest, Grant provides a helpful analogy to the instant case, then the analogy is one that lends support to and does not detract from this court's decision. In Grant, the trustee's counsel garnished certain accounts of the debtor's principal despite the fact that, at the time fo the garnishment action, the estate had enough funds to pay the debtor's unsecured creditors. Id. At 881-82. The Eleventh Circuit held that the district court did not err when it found the legal services associated with the garnishment action to be "unnecessary and self-serving." Id. At 882. In the instant case, it is undisputed that appellants appealed the Bankruptcy Court's confirmation orders primarily to preserve certain state law fraud claims that BBL has against one of its creditors. It is also undisputed that, under BBL's confirmed plan of reorganization, all of the company's creditors would be paid in full regardless of whether BBL prevailed on these claims in state court. Likewise, in his testimony before the Bankruptcy Court, Cleveland indicated that the only

beneficiaries of the appeal efforts would be BBL and/or its sole shareholder, Lofton. Therefore, as Grant makes clear, it was not error for this court to have agreed with the Bankruptcy Court that appellants' services were "unnecessary" such that they did not constitute a compensable benefit to BBL's estate.

Apparently, it is appellants' contention that whenever counsel for the trustee or, as here, the debtor-in-possession performs services that bring or that may bring additional funds into the debtor's estate, those services necessarily bestow a benefit that is compensable from the estate. Grant does not stand for this proposition, and appellants do not cite to any other authority that does. Rather, the great weight of authority holds that where, as here, services provided by counsel for the debtor-in-possession afford no benefit to the *bona fide* creditors of the estate, such services are not compensable from the debtor's estate. See e.g. In re Reed, 890 F.2d 104, 105 (8th Cir. 1989) (noting that legal services that benefit Chapter 11 debtor only are not compensable from debtor's estate); In re Word of Faith Fellowship, Inc., 1997 WL 527852 at *4 (Bankr. N.D.Ill.) (same); In re Office Products of American, Inc., 136 B.R. 983, 986 (Bankr. W.D.Tex. 1992) (same). As one court has observed, "[i]t is more appropriate that since such services benefitted only the debtor [or its principals], they be paid for by only the debtor [or its principals]." In re Storms, 101 B.R. 645, 648 (Bankr. S.D. Cal. 1989).

Based on the foregoing, the court concludes that appellants' motion for reconsideration is due to be and the same is hereby **DENIED.**

DONE this 16th day of December, 1997.

/s/ William M. Acker
WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE